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In the Supreme Court of the United States

OCTOBER TERM, 1945

POPE & TALBOT, INC., a corporation,
Petitioner,

vs.

MATSON NAVIGATION COMPANY,
a corporation,
Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Pope & Talbot, Inc., respectfully shows:

This is a petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit reversing an interlocutory decree in admiralty causes arising out of a collision occurring in San Francisco Harbor.

Petitioner was the owner and operator of the American steamship Absaroka, severely damaged in collision with the American steamship Maui, owned and operated by Matson Navigation Company, the respondent here.

STATEMENT OF THE MATTER INVOLVED

On November 2, 1941, in the early morning, while it was still dark, the steamship Absaroka proceeded out of the Oakland Estuary into San Francisco Bay headed for sea. When off Yerba Buena Island and close to the San Francisco-Oakland Bay Bridge, she was struck by the Matson steamship Maui, a former passenger liner. Both vessels were severely damaged. Matson Navigation Company filed a libel in rem and in personam in the United States District Court for the Northern District of California, Southern Division, at San Francisco, seeking to recover the damages sustained to its vessel. A cross libel was filed by petitioner, Pope & Talbot, Inc., to recover for the damages which it sustained as a result of the collision.

The trial court found and held that the collision was due solely to faults of the Maui, and awarded a decree against Matson Navigation Company, the vessel's owner, awarding petitioner, Pope & Talbot, Inc., its full damages and dismissing Matson Navigation Company's libel.

Matson Navigation Company appealed from the decree to the United States Circuit Court of Appeals for the Ninth Circuit. That court reversed the decision of the trial court as to the responsibility for the collision, and concluded that the Absaroka, not the Maui, was solely at fault. A petition for rehearing filed by Pope and Talbot, Inc., was denied by the Circuit Court of Appeals.

JURISDICTION

The basis of the jurisdiction of this Court in this cause is Section 240 of the Judicial Code (28 U.S.C. Sec. 347) and Article III, Sec. 2, of the Constitution of the United States.

THE QUESTIONS PRESENTED

The case presents the following important question of maritime law, in which a review by this Honorable Court is respectfully requested:

> Is a privileged or hold-on vessel in a crossing situation under Article 21 of the Inland Rules (33 U.S.C. 206) required to navigate at a reasonable speed under existing circumstances, or is she privileged as to her rate of speed?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. Neither the Supreme Court, nor the lower Federal courts, have to date adequately defined the obligations of the privileged or hold-on vessel under Article 21 of the Inland Rules with respect to speed. The decision of the Circuit Court of Appeals for the Ninth Circuit in this case holds, in effect, that, in the absence of a statutory speed limit, there is no rule restricting the speed at which she may proceed, provided that her speed remains constant, as required by Article 21.

This question is of compelling importance in maritime law. We believe it should be settled for future guidance, not only of the Federal courts, but for seamen and navigators as well.

The trial judge found that the Maui was traveling at an excessive speed under the existing circumstances. In his opinion, entitled Memorandum and Order, he stated:

> "I find from the evidence that the Maui was clearly at fault in the following respects: * * * for proceeding at a speed of twelve knots an hour while it was still dark, in a zone where there was likely to be traffic, when she was about to pass under the bridge, and when she was in a position where her view of ships approaching on the course taken by the Absaroka was obscured. * * *" (R. 57)

The evidence of the speed, unquestionably high in a harbor, was undisputed. In its Findings of Fact and Conclusions of Law, the District Judge concluded:

> "That the following primary faults of the Maui were, and each of them is, adequate to account for said collision: (a) Proceeding at excessive speed under existing circumstances and conditions; * * *" (R. 91)

The Circuit Court of Appeals did not affirm the trial court's decree, nor modify it to mutual fault, but rejected the trial judge's findings in toto. The Circuit Court did not base its determination that there was no fault of excessive speed chargeable to the Maui upon a different finding of fact. The facts bearing on speed were not in conflict.

While we believe that the Circuit Court was in error on each point decided,[1] we believe the most vital error was in the approval of the Maui's speed. We think the point is not merely one of miscarriage of justice in this case, but one of significance in the interpretation of the Rules of the Road at Sea which were adopted in our law as a means of preventing collisions.

Experience shows, through the number of adjudicated decisions, that the crossing situation is one which fre-

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1. This is probably the only issue we may urge in this application for a writ under Rule 38(5) of the Rules of this Court.

quently results in disaster. The vessel on a crossing course with another vessel on her port hand is required, under the Rules of the Road, to hold her course and speed. The other vessel, which has the first on her starboard hand, is called upon to keep out of the way. Most navigational problems which occur in this situation have been settled by the Federal courts. Unfortunately, there has been no authoritative decision fixing the obligation of the privileged, or hold-on, vessel with respect to rate of speed. Some Federal courts, failing to recognize the problem, have treated the obligation of the hold-on vessel, under Article 21, to maintain course and speed as though it gives a privilege to the hold-on vessel of maintaining a high speed. See, for example, *The Chicago,* 125 F. 712 (C.C.A. 2, 1903). The present decision of the Circuit Court of Appeals for the Ninth Circuit is an outstanding example of this erroneous conception of the Crossing Rule. We know of no way in which the law can be properly clarified other than through a decision of this Court. As the law as presently interpreted, and as in this case established, is highly dangerous to life and property, we think that there is urgent reason for this Court to pass upon the issue.

The findings of the District Court determining that the Maui was proceeding at an excessive speed was fully supported by evidence uncontradicted in the record. The decision of the Circuit Court of Appeals upon this point appears in its opinion at pages 852-853 of the Record. It does not find a different speed or different circumstances to have existed. Its opinion is rested upon several fundamental misconceptions of the law on speed. These errors are dangerous, as they appear to extend a license to the careless seaman.

The first misconception is brought out in the statement:

> "The only speed limit applicable to vessels on San Francisco Bay is that of Article 16, Inland Rules (33 U.S.C.A. paragraph 192) which requires 'a moderate speed' in 'fog, mist, falling snow, or heavy rain storms'. * * *" (R. 852)

While it is true that there is no local ordinance or statute specifying the speed beyond which a vessel may not run in San Francisco Harbor, Article 29 of the Inland Rules, in effect, limits the speed of all vessels in all inland waters to a reasonable speed.[2] That rule states:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (33 U.S.C. 221)

The second fundamental misconception is in the Circuit Court of Appeals' belief that the Good Seamanship Rule, Article 29 above quoted, limits the speed of a vessel only where there are unusual or special circumstances present. The Court, in its opinion (R. 853) states:

> "There are no 'special circumstances' here within the meaning of Article 29 of the Inland Rules (33 U.S.C.A. paragraph 221) which would necessitate the Maui's varying her course or speed. * * *"

A vessel in a harbor, where traffic is to be expected, must always proceed at a reasonable rate, irrespective of whether there are any unusual or special circumstances present.

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2. Farwell, *The Rules of the Nautical Road*, p. 238.

The third fundamental misconception which appears in the Circuit Court's opinion is revealed by the following statement:

> "Furthermore, we cannot say the Maui's speed was reckless, for the collision would have been prevented by a speed faster than her twelve knots as well as by a slower speed. * * *" (R. 853)

To put this in other words, the Court states that a privileged vessel's speed will not be a fault if it appears that by a faster speed she would have escaped collision! This is the only test which the court applies to the Maui's speed.

If the law is that a privileged vessel may go at anything less than a *reckless speed,* then the standard imposed is a dangerous one. "Recklessness" is not synonymous with mere negligence, but is a standard comparable to gross negligence and willfulness.

> "It was held in Cole v. Blue Ridge Railway, 75 S.C. 156, 55 S.E. 126, quoting from Proctor v. Southern Railway Co., 61 S.C. 170, 39 S.E. 351, that negligence may be so gross as to amount to recklessness, but, when it does, it ceases to be mere negligence, and assumes very much the nature of willfulness; so much so that it has been more than once held in this case that a charge of reckless conduct will justify the jury, if the same be proved, in awarding punitive, vindictive, or exemplary damages."
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> *Anderson et al. v. Atlantic Coast Line R. Co.,* 179 S.C. 367, 184 S.E. 164, 166, 104 A.L.R. 406.

Speed is the most frequent cause of collision on navigable waters as well as on land. The failure of the courts to interpret Article 29 of the Inland Rules to limit the speed

of the hold-on or privileged vessel as well as vessels in other collision situations has been unfortunate. We think it has caused many collisions and will continue to do so until the proper rule is laid down.

We submit that the only reasonable interpretation of the Rules of the Road in a crossing situation is that a privileged vessel, in harbor waters, is obligated to proceed at a reasonable speed *at all times* under the existing circumstances, and that if, at the time the Crossing Rule comes into operation and she is called upon to hold her course and speed, she is going at an unsafe speed, she is at fault if that speed contributes to the collision.

WHEREFORE, petitioner prays that the Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit directing it to send to this Court for review a full transcript of the record in the cause entitled "Matson Navigation Company, a corporation, Appellant, vs. Pope & Talbot, Inc., a corporation, Appellee," No. 10606 in the records of said court; that this Court review the said cause as to the aspects referred to in this petition; that the decision of the said Circuit Court of Appeals dated May 11, 1945, and its decree thereupon entered May 11, 1945, be reversed; that the decree of the District Court in said cause appealed from be affirmed, and that the petitioner have such other relief in the premises as may be just.

Dated July 9, 1945.

POPE & TALBOT, INC.,
Petitioner

By IRA S. LILLICK,
JOSEPH J. GEARY,
Proctors for Petitioner.